

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE *MARSHALL COMPLEX FIRE*
JASON AND LAURA JONGEWARD,
husband and wife; GORDON and
JEANNIE JONGEWARD, husband and
wife as Trustees of the Jongeward
Family Trust; RICHARD AND
PATRICIA LINN, by Jennifer Linn,
Attorney in Fact; ERIC and LISA
KOOHNS, husband and wife;
CHARLES POTTER, a single man;
JOANN POTTER, a single woman;
SCOTT AND MICHELLE SIMMONS,
husband and wife; RICK AND CHRIS
HOSMER, husband and wife; JACK
GILLINGHAM, a single man; KEITH
AND MARIANNE GESCHKE,
husband and wife; and RANDY AND
COLLEEN GESCHKE, husband and
wife, and GEANA VAN DESSEL, a
single woman,

Plaintiffs,

v.

BNSF RAILWAY COMPANY,
commonly known as THE
BURLINGTON NORTHERN SANTA
FE RAILWAY, a Delaware corporation
doing business in the State of
Washington,

Defendant.

NO. CV-09-0010-RMP

ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is Defendant's Motion for Partial Summary Judgment (Ct.
Rec. 62). Pursuant to FED. R. CIV. P. 56., the Defendant moves the Court for

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ~ 1

1 summary judgment dismissal of the Plaintiffs' statutory claims for treble damages
2 and dismissal of the claims of Christopher Collins, Kelly Collins, and Holly King.

3 The Court has considered the Defendant's Motion for Partial Summary
4 Judgment (Ct. Rec. 62) and accompanying brief (Ct. Rec. 64) declaration and
5 exhibits (Ct. Rec. 65), the Plaintiffs' response (Ct. Rec. 72) Counter Statement of
6 Undisputed Facts (Ct. Rec. 73) declaration and exhibits (Ct. Rec. 74), and
7 Defendant's reply memorandum (Ct. Rec. 79), and the remaining pleadings and
8 file in this case.

9 A telephonic hearing was held on March 25, 2010. Mr. Richard Eyman
10 appeared on behalf of the Plaintiffs. Mr. Jeffrey Aultman appeared on behalf of
11 the Defendant.
12

13 II. BACKGROUND

14 The following facts are either undisputed or, where a dispute exists, viewed
15 in the light most favorable to the Plaintiffs.

16 Plaintiffs are individuals and married couples who have an interest in real
17 property in the Marshall area of Spokane County, Washington (Ct. Rec. 53, p. 2-
18 4). Defendant BNSF Railway Company, also known as the Burlington Northern
19 Santa Fe Railway Company, ("BNSF") operates a railroad in Washington and
20 elsewhere on railroad lines that it owns and maintains, including a line between
21 Spokane, Washington, and Pasco, Washington. (Ct. Rec. 53, p. 5); (Ct. Rec. 54, p.
22 3-4).

23 On August 11, 2007, a BNSF train consisting of three locomotives and
24 seventy railcars left Spokane, Washington, around 10:45 a.m. headed for Pasco,
25 Washington (Ct. Rec. 64, p. 4); *see also* (Ct. Rec. 2-3). The weather that day was
26 hot and dry with a light wind (Ct. Rec. 65, p. 11, 14). As the train passed through
27 Marshall, approximately ten miles southwest of Spokane, fire broke out at six
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1 points along the BNSF right-of-way and spread quickly to damage two houses and
2 more than 360 acres of land (Ct. Rec. 65, p. 14). When the train was
3 approximately five or six miles past Marshall, a BNSF dispatcher called Bo
4 Hansen, the conductor on the train, and requested that Mr. Hansen perform a
5 walking inspection of the train as soon as feasible (Ct. Rec. 65, p. 29). Mr.
6 Hansen and the rest of the crew stopped the train, and Mr. Hansen walked up and
7 down the length of the train and saw nothing wrong (Ct. Rec. 65, p. 29-30). Mr.
8 Hansen testified in his deposition that he also had looked back to view the train
9 several times between Spokane and Cheney, which is past Marshall, to watch for
10 “[s]moke, cars dragging, sparks, fire, basically anything that could go wrong with
11 the train” (Ct. Rec. 65, p. 31).

12
13 The Washington State Department of Natural Resources (“DNR”)
14 responded to the fire and investigated its cause (Ct. Rec. 65, p. 17). The DNR
15 report following the investigation ruled out lightning, recreation, smoking, heavy
16 equipment, arson, children, fireworks, and power lines as causes of the fire; the
17 report found that the BNSF train was responsible for the fires (Ct. Rec. 65, p. 21).

18 One of the three locomotives on the BNSF train on August 11, 2007, was
19 Locomotive 1805, a locomotive used in yard service for three years before August
20 2007 (Ct. Rec. 74, p. 17). The Plaintiffs allege that BNSF issued a directive in
21 February, 2000, requiring BNSF shop and field superintendents to take specific
22 actions before moving yard locomotives, like Locomotive 1805, over the road (Ct.
23 Rec. 74, p. 13). The directive set out three options of how to prepare a yard
24 locomotive before moving it (Ct. Rec. 74, p. 13). Two of the options involve a
25 requirement to inspect and clean spark arrestors and eductor tubes on the
26 locomotive (Ct. Rec. 74, p. 13). The Defendant, in making its summary judgment
27 motion, contends that Locomotive 1805 was inspected and offers a work log for
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1 the locomotive that shows inspection entries for August 7, 2007, in Spokane and
2 August 11, 2007, in Pasco (Ct. Rec. 80, p. 8). However, there is no explanation or
3 elaboration on the work log as to what the inspection consisted of or what the
4 inspection showed (Ct. Rec. 80, p. 8).

5 The Plaintiffs sued BNSF for the damage from the Marshall fires, alleging
6 that BNSF intentionally caused waste and damage to Plaintiffs' property, created a
7 nuisance under RCW 7.48.120 and RCW 7.48.150, intentionally or unreasonably
8 committed common law trespass, "wrongfully, recklessly, and negligently ignited
9 and allowed the fire to escape" to the Plaintiffs' lands in violation of RCW
10 4.24.040, committed acts subjecting BNSF to liability under RCW 64.12.030
11 (providing for treble damages), and committed acts subjecting BNSF to liability
12 under RCW 4.24.630 (providing for treble damages, restoration costs, and
13 attorney fees) (Ct. Rec. 53, p. 7-9).
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15 16 **III. DISCUSSION**

17 As a preliminary matter, the Court notes that the Plaintiffs filed a Motion for
18 Order for Voluntary Dismissal of Christopher Collins, Kelly Collins, and Holly
19 King as plaintiffs on March 25, 2010 (Ct. Rec. 93). The Court granted the motion
20 on April 1, 2010 (Ct. Rec. 99). The Court, then, finds that Defendant's motion for
21 partial summary judgment is moot with respect to its requested dismissal of those
22 three former plaintiffs' claims.

23 The Defendant's request to dismiss the treble damages claims is discussed
24 below.

25 **A. Summary Judgment Standard**

26 Summary judgment is proper "if the pleadings, depositions, answers to
27 interrogatories, and admissions on file, together with the affidavits, if any, show
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1 that there is no genuine issue as to any material fact and that the moving party is
2 entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). The moving party
3 bears the initial burden of demonstrating the absence of a genuine issue of material
4 fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party
5 must demonstrate to the Court that there is an absence of evidence to support the
6 non-moving party's case. *See Celotex Corp.*, 477 U.S. at 325. The burden then
7 shifts to the non-moving party to "set out 'specific facts showing a genuine issue
8 for trial.'" *Celotex Corp.*, 477 U.S. at 324 (quoting FED.R.CIV.P. 56(e)). The
9 evidence presented by both the moving and non-moving parties must be
10 admissible. FED.R.CIV.P. 56(e).

11
12 The Court, in deciding a summary judgment motion, views the evidence in
13 the light most favorable to the non-moving party, and all justifiable inferences are
14 to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
15 (1986). "Credibility determinations, the weighing of the evidence, and the
16 drawing of legitimate inferences from the facts are jury functions, not those of a
17 judge [when she] is ruling on a motion for summary judgment." *Anderson*, 477
18 U.S. at 255. The summary judgment standard mirrors the standard governing
19 when a trial judge must direct a verdict, which is "whether the evidence presents a
20 sufficient disagreement to require submission to a jury or whether it is so one-
21 sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-
22 52. A mere "scintilla of evidence in support of the non-moving party's position"
23 is insufficient. *Triton Energy Corp. V. Square D Co.*, 68 F.3d 1216, 1221 (9th
24 Cir.1995).

25 **B. Admissibility of Evidence Presented by the Parties**

26 The Defendant argues that the Plaintiffs' treble damages claims should not
27 survive summary judgment because the Plaintiffs do not support with admissible
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1 evidence their contention that the Defendant acted willfully or recklessly under
2 RCW 64.12.030 or wrongfully under RCW 4.24.630. The Defendant contests the
3 admissibility of the following evidence offered by Plaintiff to rebut the summary
4 judgment motion:

- 5 1. a section of a DNR Report that summarizes railroad-caused fires in
6 the Cheney/Marshall area from 1970 until May 2006 (Ct. Rec. 74, p.
7 7-11); and
- 8 2. 2009 System Locomotive Policy (Ct. Rec. 74, p. 27).

9 The portion of the DNR Report relied on by Plaintiffs is not part of the
10 portion of the DNR Report submitted by Defendant in support of the motion for
11 partial summary judgment. *See* (Ct. Rec. 65, p. 13-23). The Defendant asks the
12 Court to strike the portion of the DNR Report submitted by Plaintiffs on the
13 ground that the Plaintiffs offer the report without authenticating it.

14 The proponent of a writing as evidence must authenticate the document by
15 producing evidence sufficient for the Court to find that the writing is what the
16 proponent claims it to be. FED. R. EVID. 901. Authentication or identification is a
17 condition precedent to admissibility. FED. R. EVID. 901. Regarding the document
18 in question, there is a name, "Matt Castle" at the top of the document, but no
19 signature (Ct. Rec. 74, p. 7). Plaintiffs' counsel, Richard Eymann, declares that
20 the copy of the Report, attached to counsel's declaration, is "true and correct" but
21 offers no personal knowledge of the document's preparation, as required by FED.
22 R. EVID. 602. There are no indicia of authenticity similar to the examples listed in
23 FED. R. EVID. 901(b), nor is there the required documentation to be self-
24 authenticating under FED. R. EVID. 902. There is insufficient evidence supporting
25 that the "Summary of Railroad caused fires on DNR Protection in the
26 Marshal[sic]/Cheney Area" is authentic. FED. R. EVID. 901. Therefore, the Court
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1 does not consider the portion of the DNR report concerning past fires in the
2 Marshall/Cheney area (ct. Rec. 74, p. 7-11) in rendering its decision on the
3 Defendant's summary judgment motion. FED.R.CIV.P. 56(e).

4 In addition, the Defendant argues that the 2009 System Locomotive Policy
5 is inadmissible both because it is a subsequent remedial measure taken after the
6 2007 fire at issue in violation of FED. R. EVID. 407 and because the document is
7 not properly authenticated under FED. R. EVID. 901(a). The Court agrees that the
8 2009 Policy (Ct. Rec. 74, p. 27) is inadmissible under FED. R. EVID. 407 and does
9 not consider the Policy in deciding this motion.

10 **C. Treble Damages Provisions under the Timber Trespass Statutes**

11 In their Amended Complaint, the Plaintiffs ask the Court, in the event of a
12 verdict in their favor that includes a finding that BNSF violated either RCW
13 64.12.030 or RCW 4.24.630, to "*sua sponte* treble the damages as set by the jury
14 for any damage as appropriate under [either] statute" (Ct. Rec. 54, p. 11-12). The
15 Defendant moves for summary judgment on the treble damages claims on the
16 ground that the trespass was of only negligent magnitude and argues that no
17 evidence supports that BNSF acted willfully or recklessly under RCW 64.12.030
18 or wrongfully under RCW 4.24.630.

19 RCW 64.12.030 allows the Court to treble the damages awarded to a victim
20 of a timber trespass. However, section .040 of the same statute provides that "if
21 upon trial of such action it shall appear the trespass was casual or involuntary," the
22 Court shall award only single damages. RCW 64.12.040. So, "[o]nce a trespass is
23 established, the burden shifts to the defendant to show it was not willful or
24 reckless, but rather was casual or involuntary" *Hill v. Cox*, 110 Wn. App.
25 394, 41 P.3d 495 (2003) (citing *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d
26 190, 197-98, 570 P.2d 1035 (1977)).
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1 Treble damages are also available for waste or injury to the land or personal
2 property or improvements on the land pursuant to RCW 4.24.630(1). Under that
3 statute, the plaintiff/victim of timber trespass must show that the defendant
4 "wrongfully" caused waste or injury to the land or wrongfully injured personal
5 property or improvements to real estate on the land. RCW 4.24.630(1). A person
6 acts "wrongfully" under the statute "if the person intentionally and unreasonably
7 commits the act or acts" RCW 4.24.630(1). RCW 4.24.630 does not apply
8 where liability for damages is available under RCW 64.12.030 or in several other
9 circumstances. RCW 4.24.630(2).

10
11 The Defendant supported its motion to dismiss the treble damages claims
12 with the following evidence: DNR Fire Investigation Follow-Up Report and
13 related Letter to BNSF and Incidental Incident Report (Ct. Rec. 65, p. 7-24); and
14 Deposition of Conductor Bo Hansen (Ct. Rec. 65, p. 25-34).

15 In its response, the Plaintiff relied on the 2000 Directive (Ct. Rec. 74, p. 13)
16 and Deposition of BNSF Engineer Fred Maxwell (Ct. Rec. 74, p. 21-25) to argue
17 that one or more material questions of fact persist.

18 The Defendant replied with additional evidence in the form of the work
19 report for Locomotive 1805 that the Defendant had disclosed to Plaintiff in
20 Defendant's First Supplemental Fed. R. Civ. P. 26(a)(1) Initial Disclosures. (Ct.
21 Rec. 80, p. 4-8.)

22 As the Defendant acknowledges in the reply brief (Ct. Rec. 79, p. 6) the
23 2000 Directive requires an inspection before a yard locomotive may be moved on
24 a mainline track (Ct. Rec. 74, p. 13). The work report submitted by Defendant is
25 inadequate to resolve the question of whether the appropriate inspection occurred,
26 and, if so, whether the locomotive in question passed the inspection and whether
27 the specific actions noted in the 2000 Directive had been accomplished. These are
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1 all factual issues that must be addressed by a fact finder. Based on the submitted
2 evidence, a rational fact finder may or may not conclude that the Defendant acted
3 willfully, recklessly, intentionally, or unreasonably. *See, e.g., Koirala v. Thai*
4 *Airways Intern., Ltd.*, 126 F.3d 1205, 1209 (9th Cir.1997) (willful misconduct may
5 be shown by circumstantial evidence).

6 The Defendant did not meet its burden of demonstrating an absence of
7 evidence supporting that the Defendant's conduct was either casual or involuntary
8 rather than willful or reckless, under RCW 64.12.030, or that the Defendant did
9 not act intentionally or unreasonably in violation of RCW 4.24.630. *See Celotex*
10 *Corp.*, 477 U.S. at 325. There remains, therefore, a material question, or
11 questions, or fact that makes summary judgment inappropriate.
12

13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. The Defendant's Motion for Partial Summary Judgment (**Ct. Rec. 62**) is
15 **DENIED**. Defendant's motion is denied in part for mootness and in part for
16 failure to demonstrate the absence of a genuine issue of material fact.

17 **IT IS SO ORDERED.** The District Court Executive is directed to enter
18 this Order and forward copies to counsel.

19 **DATED** this 6th day of April, 2010.
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22 s/ Rosanna Malouf Peterson
23 ROSANNA MALOUF PETERSON
24 United States District Court Judge
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